

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No. 146 of 2003

WITH

APPEAL FROM ORDER No. 213 of 2003

WITH

CIVIL APPLICATION No. 3695 of 2003

In

APPEAL FROM ORDER No. 213 of 2003

For Approval and Signature:

HONOURABLE MR.JUSTICE P.B.MAJMUDAR

- =====
- 1 Whether Reporters of Local Papers may be allowed to see the judgment ?
 - 2 To be referred to the Reporter or not ?
 - 3 Whether their Lordships wish to see the fair copy of the judgment ?
 - 4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
 - 5 Whether it is to be circulated to the civil judge ?

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SHANTIBHAI MOTIBHAI PATEL & OTHERS
Versus
ARVIND RAMPRASAD BAROT & ANOTHER

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Appearance :APPEAL FROM ORDER No. 146 of 2003

MR SB VAKIL with MS TRUSHA K PATEL for Appellants

MR MIHIR THAKORE with MR NACHIKET A DAVE for Respondents.

APPEAL FROM ORDER No. 213 of 2003

MR MIHIR THAKORE with MR NACHIKET A DAVE for Appellants.

MR SB VAKIL with MS TRUSHA K PATEL for Respondents

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CORAM : HONOURABLE MR.JUSTICE P.B.MAJMUDAR

Date : 22/01/2007

COMMON ORAL JUDGMENT

1. Since both these Appeals are directed against the order dated 24.09.2002 passed by learned Civil Judge, Senior Division, Ahmedabad Rural below Exh. 5 in Special Civil Suit No. 130 of 2002, both these appeals are disposed of by this common judgment.

2. By the impugned order, the learned trial Judge has partly allowed the interim injunction application submitted by the original plaintiffs of the suit and the defendants are temporarily restrained from selling, mortgaging, assigning, gifting, transferring, letting the properties bearing Revenue Survey No. 258/1, 341/3, 351, 198, 213/1 and 34. The defendants are also restrained from creating any third party interest over the aforesaid properties and from making any construction thereon and from handing over possession of the same to any other person in any manner whatsoever. However, as regards the other properties i.e. lands bearing Survey No. 218/1,

450, 37, 196 and 298, which is subject matter of the suit, prayer for interim injunction is not granted.

3. Being aggrieved by the aforesaid order of the trial Court granting injunction in connection with the aforesaid properties, original defendants have filed A.O. No. 146 of 2003 as according to the original defendants, the learned trial Judge should not have granted the injunction at all in connection with any of the properties.

4. Original Plaintiffs have also preferred Appeal from Order i.e. No. 213 of 2003 against the order of the learned trial Judge whereby the trial Judge has refused injunction qua some of the properties, which are the subject matter of the suit.

5. Since both these appeals are admitted, they are taken up for final hearing and disposed of by this common judgment, with the consent of the parties.

Facts of the case are as under:

6. Special Civil Suit No. 130 of 2002 is instituted by one Triveniben, stating to be widow of Bhalabhai @ Bhailalabhai Ishwarbhai Patel, and her daughter Kailasben, stating to be daughter of the said Bhalabhai @ Bhailalabhai Ishwarbhai Patel. The said suit is pending before Civil Judge, Senior Division, Ahmedabad Rural, [now Senior Civil Judge, Ahmedabad Rural]. The said suit is filed for partition and separate share. The case of the plaintiffs in the plaint is that plaintiff No.1 is mother and plaintiff No.2 is daughter. It is the case of

the plaintiffs that plaintiff No.1 had married Bhalabhai @ Bhailalbai Ishwarbhai Patel and out of the said wedlock one daughter namely Kailasben, plaintiff No.2, was born. The case of the plaintiffs is that the plaintiffs and the defendants were, and are, close relatives and part and parcel of the same family, and therefore, the plaintiffs are co-owners and in co-possession of the suit properties, which are joint family properties. It is also the case of the plaintiffs that common ancestor of the plaintiffs and the defendants was one Ishwarbhai Shankarbhai Patel who had large agricultural lands and other properties at village Bodakdev, Daskroi Taluka, Ahmedabad District. The said Ishwarbhai had two sons, namely Motibhai and Bhalabhai @ Bhailalbai and two daughters, namely Diwaliben and Hetiben. The said Ishwarbhai died intestate somewhere in 1960. According to the plaintiffs, whatever properties which were in possession of Ishwarbhai were ancestral properties. The pedigree is also given at page 5 of the plaint. It is also the case of the plaintiffs that daughters of Ishwarbhai, i.e., Diwaliben and Hetiben relinquished their rights many years back and in that view of the matter, half of the properties of the said deceased Ishwarbhai came to the share of Motibhai and another half came to the share of Bhalabhai @ Bhailalbai. It is further the case of the plaintiffs that both Motibhai and Bhalabhai @ Bhailalbai had no other self-acquired properties and were in possession of only ancestral properties. Ishwarbhai Shankarbhai Patel as well as his wife died intestate, and their two daughters, Diwaliben and Hetiben, relinquished their rights in the suit properties. Thus, Motibhai and Bhalabhai @ Bhailalbai became full owners of their

respective shares. The properties of said Ishwarbhai Shankarbhai Patel have been mentioned in paragraph 6 of the plaint, and as per the description given therein, said Ishwarbhai Shankarbhai Patel left behind him ten agricultural lands and eight houses. Prior to the death of Ishwarbhai Shankarbhai Patel in the year 1960, Bhalabhai @ Bhailalbai Ishwarbhai Patel, husband of plaintiff No.1 and father of plaintiff No.2 died intestate, leaving behind him the plaintiffs as his legal heirs. It is the case of the plaintiffs that accordingly both the plaintiffs are entitled to inherit the share of deceased Bhalabhai @ Bhailalbai Ishwarbhai Patel and they are entitled to have equal share in the joint family properties, and whatever is the share of the said Bhailalbai, the plaintiffs are entitled to inherit undivided share as half of the undivided share of deceased Ishwarbhai Shankarbhai Patel belongs to Motibhai and half of it belongs to Bhailalbai. It is further the case of the plaintiffs that at the time of death of Bhalabhai @ Bhailalbai Ishwarbhai Patel, plaintiff No.1 was aged about 26 years and plaintiff No.2 was aged about 2 years and after staying with the family members of deceased Bhalabhai @ Bhailalbai for some time, the plaintiff No.1 remarried with one Thakarshibhai Gopabhai Kapadia and the said marriage took place with the consent of family members of deceased Bhalabhai @ Bhailalbai Ishwarbhai Patel. These facts are mentioned in paragraph 8 of the plaint. Plaintiff No.1 thereafter went to reside with the said husband whom she had remarried and she took along with her the minor child, plaintiff No.2. It is also averred in para 8 of the plaint that subsequently, plaintiff No.2 became major and she has been married to one Balubbai Popatbhai Ramani

since last 30 years. It is the case of the plaintiffs that they have never relinquished their right in the family properties of Bhalabhai @ Bhailalbai Ishwarbhai Patel nor have they transferred their share to anyone. According to the plaintiffs, the plaintiffs are entitled to have half of the undivided share of the properties of deceased Ishwarbhai Shankarbhai Patel.

7. The plaintiffs have tried to explain the delay in bringing the aforesaid suit by making an averment in paragraph 11 of the plaint by stating that in connection with preparation of draft TP Scheme No.50 for the area, AUDA had called a meeting on 12.02.02 and in that meeting plaintiff No.2 had remained present and at that time, on discussing other issues with the persons present in the meeting, she came to know that the defendants have sold lands bearing survey No. 258/1, 341/3, and 351. The plaintiffs thereafter made necessary inquiries and ultimately came to know about such unauthorised sale of the said lands. Plaintiff No.2 thereafter tried to contact the defendants but they gave evasive replies and informed the plaintiffs that if they give consent, they will be paid Rs.5 lakhs. It is also the case of the plaintiffs in paragraph 12 of the plaint that in view of such reply, plaintiffs have tried to verify the facts from the revenue records and at that time, they came to know that in the revenue record, an entry is posted on 04.05.1963 being entry No. 1419 whereby the names of only Motibhai, Diwaliben and Hetiben are recorded as legal heirs of deceased Ishwarbhai Shankarbhai Patel but the names of the plaintiffs as legal heirs of deceased Bhalabhai @ Bhailalbai Ishwarbhai Patel have not been recorded in the revenue records. According to the

plaintiffs, therefore, incorrect entries are posted in the revenue records.

8. On these and such other grounds, the plaintiffs have filed the aforesaid suit for partition and separate share claiming half of the undivided share of the properties of deceased Ishwarbhai Shankarbhai Patel. It is prayed in the prayer clause that partition may be effected by metes and bounds and the defendants may be directed to handover the possession of the properties which belong to the plaintiffs or the Court Commissioner may be directed to handover portion of the plaintiff's properties. It is also prayed that the defendants may be directed to pay to the plaintiffs a sum of Rs.4,75,00,000/- towards the share of the plaintiffs in connection with the properties which they have already sold and the said amount may be directed to be paid with 18% interest. The cause of action, which is worded in paragraph 17 of the plaint, is to the effect that on 12.02.2002 when the plaintiff No.2 attended the meeting organized by AUDA in connection with draft TP Scheme No.50, they came to know about the sale of some of the lands.

9. Along with the suit, the plaintiffs have also pressed into service an application for interim injunction, Exh.5, for restraining the defendants from transferring, alienating or dealing with the properties.

10. The defendants appeared and filed Written Statement at Exh. 15. A common reply was filed to the plaint as well as the application for injunction, Exh.5. The claim of the plaintiffs is denied by the defendants in the written statement. In paragraph 17 of the written

statement, it is averred by the defendants that Bhalabhai @ Bhailalbai Ishwarbhai Patel died on 16.10.1954. It is further stated in the said paragraph that on 03.07.1963, i.e. about 9 years after the death of Bhalabhai @ Bhailalbai, Diwaliben and Hetiben relinquished their rights in favour of Motibhai and, therefore, there was no question of the said Diwaliben and Hetiben relinquishing their right in favour of Bhalabhai @ Bhailalbai Ishwarbhai Patel. Entry No. 1420 mutated in 1963 reflects that the sisters had relinquished their rights in favour of Motibhai only. It is further stated that plaintiff No.1 had remarried in the year 1958,i.e. prior to 1963, but the said fact is suppressed in the suit. In paragraph 18 of the written statement it is averred that only the defendants have got right, title and interest in the suit properties. The defendants have tried to explain in detail by giving particulars of each and every property as to how the properties in question belongs only to the defendants' side. It is further averred in paragraph 18 of the written statement that even otherwise, the plaintiffs have never asserted their rights for more than 40 years since remarriage of plaintiff No.1 and it is not stated in the plaint as to when the plaintiff No.1 remarried. It is therefore the case of the defendants that the suit is clearly time barred. It is further the case of the defendants that the defendants were using and enjoying the suit properties without any interruption for all these years and it was within the knowledge of the plaintiffs that the defendants were using and enjoying the lands in question treating it as lands of their own ownership. It is further averred that the defendants have removed the old construction and put up new

construction on some of the lands and the plaintiffs have never objected to the same. It is the case of the defendants that even going by the principles of adverse possession, the properties belong to the defendants.

11. In the Written Statement, the defendants have also relied upon certain revenue entries which were posted many years back. It is the say of the defendants that after 40 years of posting of entries, the plaintiffs are trying to make out a case that such entries were falsely recorded.

12. The defendants have also resisted the suit on the ground of delay and laches, ouster and adverse possession.

13. The learned trial Judge, after hearing the parties, passed the impugned order dated 24.09.2002 whereby the learned trial Judge has partly allowed the interim injunction application, temporarily restraining the defendants from selling, mortgaging, assigning, gifting, transferring, letting the properties bearing Revenue Survey No. 258/1, 341/3, 351, 198, 213/1 and 34. The defendants were also restrained from creating any third party interest over the aforesaid properties and from making any construction thereon and from handing over possession of the same to any other person in any manner whatsoever. However, as regards the other properties which is subject matter of the suit, prayer for interim injunction was rejected.

14. Learned senior counsel Mr. S.B. Vakil appearing with Ms. Trusha K Patel in Appeal No. 146 of 2003 which is

filed by the original defendants vehemently submitted that the trial Court has not correctly considered the facts and circumstances of the case and even though the plaintiffs have not been able to prove their case, injunction is granted regarding part of the properties, which could not have been granted. It is submitted by Mr. Vakil that plaintiff No.1 remarried as back as in the year 1958 and therefore she cannot ask for partition of the suit property. He further submitted that the plaintiff No.1, at the time of her re-marriage, took the minor daughter with her and the plaintiffs have no right, title and interest in the suit properties. He further submitted that none of the plaintiffs ever tried to assert their right for more than 40 years in connection with the suit properties. Mr. Vakil vehemently submitted that even otherwise, it is a clear case of ouster, and, therefore, the defendants have become full owners of the suit properties. He further submitted that even some of the properties were sold by registered sale deed since long and there can be constructive notice when the properties are sold by registered sale deed, and yet the plaintiffs have not taken any steps for setting aside such sale deeds. Mr. Vakil submitted that one property is sold in 1967, and two other properties are sold in 1991 and 1996 by registered sale deed, yet the plaintiffs have never tried to challenge the said sale deed nor have the plaintiffs joined any of the purchasers in the suit and only a vague prayer is made in the suit for setting aside whatever sale deed that might have been executed by the defendants. It is submitted that the trial Court could not have granted injunction in connection with some of the properties which were sold by the defendants since long more particularly when the plaintiffs have not

joined the purchasers in the suit. Mr. Vakil further submitted that the learned trial Judge has not properly appreciated the evidence at Exh. 17/2. Mr. Vakil further submitted that there is voluminous evidence on record to suggest that lands bearing survey No.218/1, 450, 238, 37 and 196 were self-acquired properties of Motibhai and eight houses which were also subject matter of the suit, were also self-acquired properties of Motibhai. He further submitted that even with regard to the rest of the properties, the plaintiffs have not made out any case and the trial Court could not have granted the injunction application even partly.

15. In connection with land bearing survey No. 218, he submitted that the said land was cultivated by Motibhai and by virtue of the same, Motibhai was stated to be deemed purchaser under the Bombay Tenancy and Agricultural Lands Act, 1948 and entry No. 1063 was posted to that effect.

16. Similarly, regarding survey No. 238, copy of sale deed is produced at Exh. 17/7 showing that the said Motibhai had purchased the same by registered sale deed on 10.08.67.

17. Regarding survey No. 450, the same was purchased by Motibhai with other co-owners jointly who are not family members, and part of the same was already sold to one Jambuvan Association and the said Association has already put up construction on the said land. Though Ishwarbhai used to cultivate the land, his tenancy was terminated vide entry No. 1216.

18. Mr. Vakil further submitted that regarding land bearing Survey No. 196, Motibhai is deemed purchaser under the Tenancy Act as he was cultivating the land for which entry No. 1953 is already mutated since long, which is at Exh. 17/6. On perusal of entry No. 1216, it becomes clear that name of protected tenant Ranchhodbhai was deleted as he failed to cultivate the land for last 2 years and name of Motibhai was entered as ordinary tenant.

19. Similarly, so far as land bearing survey No. 37 is concerned, the said land is regranted to Motibhai under the Bombay Tenancy Act in the year 1950 even when Bhalabhai @ Bhailalbai Ishwarbhai Patel was alive, and entry No. 1001 was already posted in the revenue records at the relevant time.

20. Mr. Vakil, therefore, submitted that the trial Court is justified in coming to a conclusion that the said properties were self-acquired properties of deceased Motibhai, and, therefore, it should go to the Branch of said Motibhai i.e. present defendants. Mr. Vakil has tried to justify the order of the trial Court so far as the aforesaid properties are concerned, as there is a cross Appeal from Order No. 213 of 2003 filed by the original plaintiffs.

21. Mr. Vakil further submitted that so far as other lands are concerned for which injunction is granted, the plaintiff had no right even in connection with the same. It is submitted by Mr. Vakil that only in order to extract some money, the litigation is instituted after so many years. Mr. Vakil submitted that after the order of

the trial Court, plaintiff No.1 Triveniben died on 29.11.2003 and one Arvindbhai Ramprasad Barot and Haresh Keshavlal Patel have applied for being brought on record as legal representatives of deceased Triveniben in the appeal as they have produced a Will of deceased Triveniben by which the said Triveniben bequeathed her properties in favour of the aforesaid two legatees and they have been accordingly brought on record. It is submitted by Mr. Vakil that the aforesaid two persons are land-brokers and the litigation in question is sponsored by them. It is submitted by Mr. Vakil that even criminal cases are pending against them in connection with forgery of a Will of someone else and the present defendants have also filed some proceedings against the aforesaid two persons and, therefore, taking advantage of the situation, after so many years, the said two persons have instigated the plaintiffs to institute the suit and the fact that subsequently the Will is brought on record in this Appeal from Order under which the said two persons are beneficiaries, that itself shows that the whole litigation is instituted at their instance as virtually they are interested in the disputed properties. It is further submitted that plaintiff No.2 has filed an affidavit to the effect that the Will executed by her mother is correct. The said fact itself speaks as to who are the real persons behind the litigation. It is submitted that there was no question on the part of the plaintiff No.1 to execute a Will in favour of a stranger. In this connection Mr. Vakil has relied on the averments made in Civil Application No. 1508 of 2006. It is submitted that in another case, Arvind Ramprasad Barot, who is brought on record in view of the so called Will executed in his favour by original plaintiff No.1,

had tried to get a property mutated in his name on the basis of a Will dated 29.09.99 purported to have been executed by one Ramkumar Magniram eventhough the said Ramkumar Magniram was alive. It is submitted by Mr. Vakil that this is the credential of the said Arvind Barot who have given application in this proceedings to be brought on record as legal heir of deceased Triveniben [original plaintiff No.1]. Mr. Vakil further submitted that in the aforesaid case of forged Will , at the instance of Collector, Mamlatdar has already filed a criminal complaint. Mr. Vakil therefore submitted that Mr. Arvind Barot is in the habit of creating false and fabricated Wills for grabbing properties and that unless he produces a probate on record, no importance can be given to such a Will which deceased Triveniben is stated to have executed in favour of strangers. Mr. Vakil further submitted that the said Arvind Barot is residing at Thaltej, Daskroi Taluka, Ahmedabad i.e. nearby the suit properties whereas deceased Triveniben was admittedly residing at Amreli District, which is at a great distance from Ahmedabad. He further submitted that plaintiff no.2, daughter of Triveniben, is also married since about 30 years and is also residing at Village Saldi, District Amreli.

22. It is submitted by Mr. Vakil that this is a clear case of trafficking in litigation since the aforesaid two persons are sponsoring the litigation who want to grab away defendants' properties. It is submitted that the aforesaid people who are so-called beneficiaries are sponsoring the litigation and it cannot be said that they have any genuine interest in the so called co-parcenory and joint family properties of the defendants. Mr. Vakil

submitted that in any case, they being strangers, even if it is proved that so called Will is genuine, then also they cannot ask for joint possession being strangers to the family. Mr. Vakild further submitted that so far as the right of plaintiff No. 2 is concerned, it is a clear case of ouster since the said plaintiff has never bothered to claim her right or interest in the property and the defendants have been dealing with the properties in their own manner by cultivating the lands and have also put up some construction and some of the lands have already been sold. Mr. Vakild further submitted that the plaintiffs have failed to make out any case, nor have they made any averments as to how the suit is within limitation and there is nothing to show that at any point of time during the last about 40 years either of the plaintiffs have tried to ask for any share in the suit property or have tried to assert their right in any manner. It is submitted that if injunction is granted even regarding part of the land, it is not the original plaintiffs but only the aforesaid persons who are the so called beneficiaries of the Will , who are benefited by the injunction, and under the circumstances, injunction being an equitable relief, is not required to be granted. Mr. Vakild further submitted that the aforesaid two persons were not parties to the civil suit, but in view of the death of plaintiff No.1, on the basis of their application for being joined as parties based on the aforesaid Will , they are joined as parties during the pendency of these appeals. Mr. Vakild further submitted that since the purchasers of the properties which were sold have not been joined as parties, injunction could not have been granted without joining the purchasers, but still the trial Court has granted injunction qua such

properties also. On law point, Mr. Vakil submitted that in view of section 2 of the Hindu Widows Re-marriage Act 1856 read with section 24 of Hindu Succession Act, 1956, the original plaintiffs have no right in the suit property. He further submitted that this is a clear case of ouster since the original plaintiffs have never bothered to claim their right or interest in the property for a very long period of about 40 years. He further submitted that in any case, the plaintiffs cannot ask for partition, for which he has relied upon the judgment reported in 2002 (2) GLR 1365 and Article 333, 306, 215 and 217 of the Hindu Law.

23. On these grounds, Mr. Vakil submitted that the order of injunction granted by the trial Court qua rest of the properties is also required to be vacated and the order of trial Court in refusing injunction is required to be confirmed.

24. On the other hand, Mr. Mihir Thakore, learned senior counsel submitted that it is no doubt true that as far as transfer of land by way of sale is concerned, the plaintiffs have not joined the purchasers as parties, yet the trial Court can ask the parties to maintain status quo. Mr. Thakore further submitted that in the year 1954 when Bhalabhai @ Bhailalabhai Ishwarbhai Patel died, Triveniben had limited interest in 1/4th share under section 3(2) and (3) of the Hindu Women's Rights to Property Act, 1937, and 3/4th share continued to be of H.U.F. It is further submitted by Mr. Thakore that in the year 1956 when Hindu Succession Act, 1956 came into force, under section 14 of the said Act, 1/4th limited interest of Triveniben became absolute as she had

remarried in 1958. Mr. Thakore further submitted that in 1960 when Ishwarbhai Shankarbhai Patel died, there will be deemed partition of the HUF i.e. $3/4^{\text{th}}$ share, and the properties of deceased Ishwarbhai will be divided amongst other co-sharers. It is submitted by Mr. Thakore that the case of the plaintiffs fall under section 8 of the Hindu Succession Act and both of them will be Class-I heirs. He further submitted that on Ishwarbhai's death, his $1/4^{\text{th}}$ share in HUF property will devolve by succession as per section 6 of the Hindu Succession Act as he has left behind female heirs of Class I. He further submitted that the heirs of Class-I will get equal $1/5^{\text{th}}$ share of the $1/4^{\text{th}}$ as per sections 8 and 19 of the Hindu Succession Act. He further submitted that the said share will be absolute. Mr. Thakore further submitted that the trial Court has committed an error in coming to the conclusion that some properties were self-acquired properties as ultimately even if one co-sharer cultivates the land, it should be deemed to be on behalf of all the family members, and therefore injunction should be granted in connection with all the lands. Mr. Thakore further submitted that it is true that some of the properties were sold long back. Mr. Thakore is not in a position to give any satisfactory explanation as to how injunction can be granted even though such purchasers are not joined as parties to the suit. So far as the question of ouster is concerned, Mr. Thakore submitted that it is required to be proved satisfactorily and unless a full-fledged trial is conducted, at this stage, it is difficult for the Court to give any finding on this count and according to Mr. Thakore, the burden of proof so far as ouster is concerned is on the defendants, and they are required to discharge their burden by leading

cogent evidence. Mr. Thakore further submitted that it is true that during the pendency of this appeal, legatees under the Will have been brought on record. He however, submitted that even if the Will is taken out of consideration, the plaintiff No.2 will be entitled to have her share in the properties as well as share of her mother. Mr. Thakore further submitted that when the trial Court has passed a discretionary order, this Court may not interfere with the order of the trial Court by allowing the appeal filed by the defendants, under section 43 of CPC. Mr. Thakore further submitted that some of the properties which are held to be self acquired properties of Motibhai are in fact belonging to joint family as Motibhai can be said to have been cultivating the land on behalf of the family. Mr. Thakore, during the course of arguments, pointed out that the plaintiff No.2 has not denied the execution of Will by her mother, plaintiff No.1, and in that view of the matter, the legatees will be entitled to have the share of Triveniben, plaintiff No.1.

25. Both the sides have also relied upon various judgments in support of their respective contentions. I have heard the learned counsel appearing in these matters at length, and have also considered the voluminous documentary evidence on record.

26. Considering the documentary evidence available on record at this stage, prima facie, the following points, as such, are un-disputed:-

[1]. Plaintiff No.1 had married Bhalabhai @ Bhailalbhai Ishwarbhai Patel and the said

Bhalabhai @ Bhailalabhai Ishwarbhai Patel died in the year 1954, leaving behind him his wife, plaintiff No.1 and his daughter, plaintiff No.2.

- [2]. Triveniben remarried Thakarshibhai Gopabhai Kapadia. The plaintiffs have not given the date on which plaintiff No.1 remarried but the defendants have stated that she re-married in 1958.
- [3]. On remarriage, she went to stay with Thakarshibhai Gopabhai Kapadia at Amreli and she also took with her plaintiff No.2, who was aged about 2 years at that time.
- [4]. There is nothing in the suit to show that in between, till the suit is filed, either of the plaintiff tried to assert their right in the joint family properties for a span of about 40 years.
- [5]. In between, some of the properties were already sold by the defendants - one property is sold in 1967, another in 1991 and another in 1996 by registered sale deed, yet the plaintiffs have never tried to challenge the said sale deed.
- [6]. The plaintiffs have not joined the purchasers of the properties which are sold by registered sale deed.
- [7]. So far as the properties which are sold by the aforesaid sale deeds are concerned, revenue entries are posted in the revenue records at the

relevant time and the same have not been challenged.

- [8]. Ishwarbhai Shankarbhai Patel, father of Bhalabhai @ Bhailalbhai died in the year 1960 and thereafter in the year 1963, an entry is posted on 04.05.1963 being entry No. 1419 whereby the names of only Motibhai, Diwaliben and Hetiben are recorded as legal heirs of deceased Ishwarbhai Shankarbhai Patel qua six lands.
- [9]. There is nothing on the record to suggest that on the death of Ishwarbhai Shankarbhai Patel, the plaintiffs came to Ahmedabad to assert their rights nor is there anything on the record to show that any correspondence took place between the plaintiffs and the defendants for all these years.
- [10]. There is nothing on record to suggest that the plaintiffs have ever asked for their share in the income for all these years, nor have they tried to assert their share in any manner for all these years.
- [11]. So far as the alleged self-acquired properties of Motibhai are concerned, revenue entries do not reflect the name of any other person as co-sharers for the said properties.

The aforesaid aspects, as such, are not in dispute. In this background, it is required to be decided whether the injunction as prayed for, which is a discretionary relief under order 39, CPC, is required to be granted or not?.

27. As pointed out earlier, after the impugned order was passed by the trial Court, Triveniben, plaintiff No.1 died, and on the basis of a Will purportedly executed by the said Triveniben, Arvind Ramprasad Barot and Hitesh Keshavlal Patel have been joined as parties as legal representatives of deceased Triveniben.

28. So far as the order of the trial Court in connection with refusing injunction regarding certain properties which are held to be self-acquired properties is concerned, considering the prima facie evidence on record, it cannot be said that the trial Court has committed any error in coming to the said conclusion. Documentary evidence produced on record clearly suggest that deceased Motibhai was cultivating the land in question. The learned trial Judge in paragraphs 33 to 36 of his order has given cogent reasons for coming to the conclusion that lands bearing Survey No.218/1, 450, 238, 37 and 196 belongs to Motibhai as it was self-acquired properties. So far as survey No. 218/1 is concerned, Motibhai was cultivating the land and even in the revenue record, the name of Motibhai was entered showing him to be cultivating the land in question. It is not in dispute that Motibhai's name was inducted under the Tenancy Act as he was declared as deemed purchaser under the Bombay Tenancy Act. The decision of the Tenancy Authority was never challenged by the plaintiffs all throughout. When there is an order of the competent authority under the Bombay Tenancy Act declaring the rights of Motibhai treating him as deemed purchaser under section 32.G of the Tenancy Act, the Civil Court also cannot go behind the same. The learned trial Judge is justified in coming

to the conclusion that the said property must be treated as self-acquired property of Motibhai.

29. So far as the land bearing survey No. 238 is concerned, as per the evidence on record, Motibhai has purchased the land by sale deed on 10.08.1967. Entry to that effect was also posted in the revenue records. The learned trial Judge has considered the aspect whether it was redemption of mortgage or not by giving reasons in paragraph 33. In my view, the trial Court cannot be said to have committed any error in coming to the said conclusion. It is on record that Motibhai purchased the land land by registered sale deed and the recital in the sale deed, which is more than 30 years old, do not support the case of the plaintiffs.

30. Similarly, so far as land bearing survey No. 450 is concerned, it is pointed out that part of the land was sold to one Jambuvan Association and the said Association has already put up construction of flats on the said land. The remaining portion, i.e. 3309 sq. mtrs. is in possession of the defendants. The said sale transaction is also not challenged by joining the purchasers as parties. It is pointed out to the Court that the said Jambuvan Association has constructed various flats and various persons are occupying the same since long. So far as the remaining portion of survey No. 450 which is in possession of the defendants is concerned, it is pointed out that the defendants have carried out some construction since long and other occupants are occupying the same. It is further pointed out that so far as the land bearing survey No. 450 is concerned, earlier, father of Motibhai and Bhalabhai @ Bhailalbai, Ishwarbhai was

cultivating the land. It is also pointed out that tenancy of protected tenant Ishwarbhai was terminated as he failed to cultivate the said land for 2 years and ultimately Motibhai was inducted as an ordinary tenant he has become deemed purchaser under the Bombay Tenancy Act.

31. As regards land bearing survey No. 196 is concerned, Motibhai was declared as a purchaser under the Bombay Tenancy Act. In this connection, it is required to be pointed out that by entry No. 1216, name of a protected tenant, Ranchhodbhai, was lastly deleted as he has not cultivated the land since last two years and name of Motibhai was entered into as an ordinary tenant and ultimately under the Tenancy Act, the land was granted to him.

32. Similarly, so far as survey No. 37 is concerned, the said land is also granted to Motibhai as he was cultivating the land and Entry No. 1001 is made in that behalf.

33. On the basis of the aforesaid circumstances and documentary evidence on record in the form of revenue entries and considering the fact that competent authority under the Tenancy Act has passed orders declaring rights of Motibhai as deemed purchaser, it prima facie proves that they were his own self-acquired property. For all these years, the plaintiffs have never tried to assert their rights or ask for their share in the said properties. Prima facie, when a certificate under section 32.M of the Tenancy Act is issued, it is presumed that the person in whose favour it is issued can be said

to be the owner of the same. The plaintiffs are not in a position to point out that the orders passed by the Tenancy Authorities are bad or illegal or that by virtue of the said orders, it can not be said that the properties are self acquired properties of Motibhai. The plaintiffs are also not in a position to point out that Motibhai was holding the properties on behalf of joint family. Considering the aforesaid aspects, in my view, the order of the trial Court holding that the said property is self acquired property is not required to be disturbed in this Appeal from Order.

34. Insofar as the question regarding rest of the properties is concerned qua which injunction is granted by the trial Court, it is not in dispute that some properties have already been sold away since long. It is on record that land bearing survey No. 258/1, 341/3 and 351 are sold long back and the purchasers are not joined as parties, and the said fact is not in dispute. When a property has already been sold, there was no question of granting injunction as such injunction becomes infructuous unless the purchaser is impleaded as party to the proceedings and injunction is also granted against such purchasers. It is submitted that eventhough this fact was pointed out to the trial Court by way of documentary evidence in connection with the sale of aforesaid properties yet the trial Court has granted injunction, which in my view, cannot operate as such injunction would become infructuous unless the purchasers are made parties and injunction is granted against them. Learned counsel Mr. Mihir Thakore is also not in a position to controvert this factual aspect. In that view of the matter, injunction granted by the learned trial

Judge in connection with the lands bearing survey No. 258/1, 341/3 and 351, which are already sold out, is required to be vacated.

35. If the aforesaid properties are taken out of consideration, then the question which requires consideration is whether injunction granted in connection with lands bearing Survey No. 198, 213/1 and 34 is required to be confirmed or not. In this connection, the point which requires consideration is, whether the plaintiffs are able to prove prima facie case and whether injunction as prayed for is required to be granted restraining the defendants from transferring the aforesaid properties. In connection with the rights of the properties, learned counsel Mr. Vakil has relied on the judgment of a Division Bench of this court in the case of SITABEN vs. BHANABHAI M PATEL reported in 2002 (2) GLR 1365 to point out that on the marriage of a female, she ceases to be a member of her father's HUF and becomes a member in her husbands' HUF, and therefore, has no interest or share in the property of her father's HUF on the date of the suit and that she cannot file a suit for partition of joint family properties of her father.

36. Mr. Vakil, learned counsel also relied on the following judgments in connection with ouster as well as in connection with the position on remarriage of a widow:-

1. AIR 1937 Lahore 890
2. AIR 2006 Patna 135
3. AIR 2006 HP 108
4. AIR 1993 Bombay 134

5. AIR 2003 Karnataka 380
6. AIR 1998 SC 1694
7. AIR 66 CALCUTTA 60
8. JT 2000 (10) SC 223

37. It is no doubt true that as argued by Mr. Mihir Thakore, the question of ouster is required to be decided after considering the entire material on record and the burden of proof about the same is on the defendants. However, as discussed earlier, while granting injunction under section 39, CPC, the Court is required to consider prima facie case from all angles in the light of the material on record. From the narration of the facts above, it is not in dispute that for more than 40 years, none of the plaintiffs have ever tried to assert their rights nor have they tried to ask for any share or income from the joint family income. It is also not in dispute that registered documents, which had taken place long back, have not been challenged for all these years. It is required to be noted that the plaintiffs have not been able to produce any prima facie evidence to show as to whether any intimation was given by the Town Planning authorities to attend the meeting in connection with the proposed TP Scheme. There is nothing to suggest that any intimation was given to the plaintiffs to attend such meeting as the plaintiffs have tried to make out a case regarding attending the said meeting, as the cause of action for filing the suit, when the plaintiffs came to know about the sale transactions effected by the defendants. When the name of the plaintiffs were never finding place in the revenue record, there was no question of they being called for any such meeting by the appropriate authorities. In this background, I find some

substance in the argument of Mr. Vakil that the real beneficiaries of the injunction would be Arvindbhai Ramprasad Barot and Haresh Keshavlal Patel who have been joined as legal representatives of deceased Triveniben, legatees under the so called Will executed by Triveniben. From the facts narrated above, it appears that the conduct of the said Arvindbhai Ramprasad Barot and Haresh Keshavlal Patel is extremely doubtful and even if they are able to establish their rights, being strangers to the family, they cannot share joint possession with the family. Plaintiff No.2 is married since about 30 years and is staying at a different place since then. There is no material available on record that she has ever tried to assert her right to either share in the property or share in the agricultural income. The plaintiffs are required to show to the Court as to how the suit is within limitation which the plaintiffs have failed to do in the present case.

38. Mr. Thakore has relied upon certain judgments in order to prove that the plaintiffs will have right in the family properties of deceased husband even after re-marriage of plaintiff No.1 in the year 1958, as the limited right would be extended and it became unlimited after the Hindu Succession Act 1956 came into operation. He further submitted that even as per the say of the defendants, plaintiff No.1 remarried in the year 1958 and, therefore, she had a right in the property of her deceased husband at the time of her re-marriage. Mr.Thakore further submitted that in any case, plaintiff No.2 being daughter of Bhalabhai @ Bhailalbai Ishwarbhai Patel, she will have right in the disputed properties and her right cannot be said to have been

extinguished in any manner. In connection with such rights as well as in connection with ouster, Mr. Thakore has relied upon the following decisions:

1. AIR 1978 SC 1239
2. AIR 1986 SC 1753

It may be true that the rights of plaintiff No.2 can be said to have been continued insofar as ancestral properties of deceased Ishwarbhai Shankarbhai Patel is concerned, however, it is required to be noted that for more than 40 years, none of the plaintiffs have ever tried to assert their right. There is also nothing on record to show that even at the time of death of Ishwarbhai Shankarbhai Patel either of the plaintiffs came and met the family members of the defendants. It may be true that if the Will in question is taken out from consideration, plaintiff No.2 may get her share in her mother's properties. However, it is not in dispute that after her marriage, which took place about 30 years ago, she is residing with her husband at a different place altogether and for all these years plaintiff No.2 has never tried to assert her right in any manner. Ultimately, even if the plaintiff No.2 succeeds in proving her right in connection with the suit properties, such right would be limited to three properties, i.e. lands bearing Survey No. 198, 213/1 and 34, which can be said to be family properties. Granting of injunction is a discretionary relief under Order 39 of CPC and conduct of the parties and whether the suit is filed within limitation etc. are required to be considered for finding out prima facie case. It is also not in dispute that for all these years, the defendants were in possession of the suit properties and enjoying the suit properties without

any interruption treating it as lands of their own ownership. The plaintiffs have never asserted their right in any manner for all these years. It appears from the documentary evidence on record and the conduct of the plaintiffs that the plaintiffs were never bothered and they were aware that they have no right in the suit properties and only in the year 2002 they tried to jump in the fray by filing the suit for partition. At this stage, reference is required to be made to a judgment of the Hon'ble Supreme Court in the case of M. GURUDAS vs. RASARANJAN reported in (2006) 8 SCC 367. In paragraph 19, the Supreme Court has observed as under:

“19. A finding on “prima facie case” would be a finding of fact. However, while arriving at such a finding of fact, the court not only must arrive at a conclusion that a case for trial has been made out but also other factors requisite for grant of injunction exist. There may be a debate as has been sought to be raised by Dr. Rajeev Dhavan that the decision of the House of Lords in American Cyanamid Co. v. Ethicon Ltd. would have no application in a case of this nature as was opined by this Court in Colgate Palmolive (India) Ltd. v. Hindustan Lever Ltd. and S.M. Dyechem Ltd. v. Cadbury (India) Ltd. but we are not persuaded to delve thereinto”.

In paragraph 21, the Honourable Supreme Court observed as under:

“21. While considering the question of granting

an order of injunction one way or the other, evidently, the court, apart from finding out a prima facie case, would consider the question in regard to the balance of convenience of the parties as also irreparable injury which might be suffered by the plaintiffs if the prayer for injunction is to be refused. The contention of the plaintiffs must be bona fide. The question sought to be tried must be a serious question and not only a mere triable issue. “

39. Considering the aforesaid aspect of the matter I am of the view that the learned trial Judge erred in granting interim relief, even qua the land bearing survey Nos. 198, 213/1 and 34.

40. I am of the view that the injunction granted by the trial Court is required to be modified to the effect that in case the lands bearing Survey No. 198, 213/1 and 34 are sold or transferred in any manner during the pendency of the suit, the same shall be subject to the final outcome of the suit, and in the event of any sale or transfer of lands bearing Survey No. 198, 213/1 and 34, the defendants shall disclose the names and address of the transferors / purchasers to the trial Court and it shall be open to the plaintiffs to join them as party defendants in the suit so that if the plaintiffs are ultimately able to prove their case, the trial Court can pass effective decree. So far as rest of the properties [over and above the aforesaid three properties] which are not yet sold / transferred are concerned, in case such

properties are sold / transferred, such transfer shall also be subject to the result of the suit. It is no doubt true that at present the suit is only for partition and in view of the judgment of the Division Bench, the suit is not maintainable. Mr. Mihir Thakore, learned counsel submitted that the plaintiffs may consider to amend the plaint in this behalf, but on this aspect, I am not required to express any opinion.

41. It is clarified that the observations made by the trial Judge in the impugned order as well as the observations made by this Court in this order are tentative in nature and meant only for the purpose of deciding the interim application and the present appeals; the trial Court shall hear and dispose of the suit on its own merits and as per the evidence on record without being influenced by the observations made therein.

42. In the result, Appeal from Order No.146 of 2003 is partly allowed. Injunction granted by the trial Court is modified to the aforesaid extent.

43. So far as the question of eight dwelling houses is concerned, the trial Court has not granted any relief in respect of the said properties. I am of the view that the findings arrived at by the trial Court is just and proper and the same is not required to be interfered in these Appeals.

44. So far as Appeal from Order No. 213 of 2003 is concerned, in view of what is stated above, the same is devoid of any merit, and is, therefore, dismissed.

45. There shall be no order as to costs in both the appeals.

46. At this stage, Mr. Mihir Thakore, learned counsel requests that his clients may consider going to the Honourable Supreme Court and therefore requests for staying the implementation and execution of this order, and for continuing the interim relief granted earlier in these appeals for a reasonable time. The said request is opposed by the learned advocate Ms. Patel and she submitted that when the appeal was admitted, the rights of the original plaintiffs were only under consideration but during the pendency of the appeal, legatees under the Will, whose credentials are highly doubtful have been joined. Be that as it may, this Court, while admitting the appeal, has granted interim relief, and, therefore, I am of the view that the request for staying the present order is reasonable as the original plaintiffs want to carry the matter to the Honourable Supreme Court. In the result, the implementation and execution of this order is stayed till 12th February 2007 and the interim relief granted by this Court at the time of admission of the appeal is ordered to continue till 12th February 2007.

[P. B. MAJMUDAR, J.]

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